

N.D.A.G. Letter to Price (May 19, 1989)

May 19, 1989

Mr. Robert Q. Price
Price & LaQuay
P.O. Box 69
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Dear Mr. Price:

Thank you for your April 6, 1989, letter concerning the responsibility of water resource districts to manage water within their boundaries.

The three questions posed by your letter can be distilled into two issues: 1) the responsibility of a water resource district to manage water within its jurisdiction; and 2) the authority of a city to sell water.

Any analysis of these questions is dependent upon factual determinations. Because of the factual questions presented by these issues, issuance of an Attorney General's opinion, issued only to resolve questions of law, is inappropriate. Although I cannot prescribe a specific course of action, I can provide you with references to applicable statutes and interpretations of those statutes where necessary.

The first issue you raise pertains to the application of N.D.C.C. §§ 61-16.1-09(8), (9), (10). These subsections authorize the Water Resource Board to: 1) issue rules for water management, control, and regulation; 2) build and operate recreation facilities; and 3) do all things necessary to "preserve the benefits" of water conservation and control. Conspicuously absent from these powers is the authority to authorize the use of water or regulate the use of water once a permit is granted.

Although N.D.C.C. § 61-16.1-09 provides water resource boards with general regulatory authority concerning water, other, more specific provisions of the North Dakota Century Code make it clear the State Engineer has primary authority to authorize and regulate the use of water.

Authority for the beneficial use of the state's waters may only be obtained in accordance with N.D.C.C. ch. 61-04. N.D.C.C. §§ 61-01-01; 61-04-01.2. The Legislature has given the State Engineer the authority to grant permits and define the terms and use of permits granted. N.D.C.C. §§ 61-04-02, 61-04-03, and 61-04-06.2. (The State Water Commission may also retain authority over permits in excess of 5,000 acre-feet for specific permits. Generally, this authority has been exercised only for industrial development. N.D.C.C. § 61-04-06.) The State Engineer is also authorized to enforce the terms of the permits through administrative and court action. See e.g., N.D.C.C. §§ 61-03-21.1, 61-04-09, 61-04-11, 61-04-29; 61-04-30. (Two recent legislative actions have strengthened the

State Engineer's authority for enforcement. See House Bill No. 1129, 51st Leg. (1989); Senate Bill No. 2174, 51st Leg. (1989).)

Thus, it is the State Engineer, not the water resource district, that is responsible for assuring that water permits are used according to the terms of those permits and state law. That is not to say a water resource district may not proceed to enforce its own rights in the event those rights are harmed by the wrongful action of others. See N.D.C.C. § 61-16.1-09(1) (granting authority to "[s]ue and be sued in the name of the district").

Whether a water resource district would be negligent for failing to protect its own rights in a particular situation would be a question of fact and would have to be resolved in light of the circumstances of each case. In addition, there may be a right on the part of a board or other citizens to bring actions to protect a public resource (either the water or the dam). See N.D.C.C. ch. 32-40. However, standing may be difficult to establish in such cases depending upon the facts of the case.

With regard to the second issue, which concerns a city's authority to sell water, N.D.C.C. § 40-33-13 authorizes municipalities to sell surplus water outside the city limits. Cities are authorized to sell water only to those "maintaining manufacturing plants, residences, or other buildings outside of the municipal limits." N.D.C.C. § 40-33-13. The city may sell only that amount of water that is surplus to the city's needs. Id. Furthermore, any proposals for the sale of water must first be presented to the State Engineer prior to entering any agreement. N.D.C.C. § 61-02-27.

A further constraint upon the sale of water by the city is the city's water permit. Generally, a city's water permit will be restricted to municipal use. Municipal use is defined as:

[T]he use of water by the state through its political subdivisions, institutions, facilities, and properties, and the inhabitants thereof, or by unincorporated communities, subdivision developments, rural water systems, and other entities, whether supplied by the government or by a privately owned public utility or other agency or entity, for primarily domestic purposes.

N.D.C.C. § 61-04-01.1(8).

Each water permit places a limit on the amount of water which may be used and prescribes the diversion point and source of that water. The permit may also set a pumping rate, limit the place of use, and even define a time period for use. Unless the State Engineer authorizes a change in any of these permit conditions, any sale would have to meet the conditions of the Permit.

A significant condition in a sale outside the city limit would be a change in the place of use. N.D.C.C. § 61-04-15 authorizes a transfer of a water permit from one parcel of land to another. With the State Engineer's approval, a transfer may be made to a parcel of land owned or leased by the water permit holder. The transfer may only be made if there is "reasonable proof that such . . . transfer can be made without detriment to existing rights."

N.D.C.C. § 61-04-15. The State Engineer's decision in that instance would be final unless an interested party using the same source of water brought an action in the district court within 60 days. Id.

The permissible use of a municipal water permit is determined from the permit language. For example, a permit may merely state that the water is to be used "for municipal purposes." This would imply the city could use the water for a municipal purpose anywhere. In contrast, a permit may be issued which would specify the municipal use for a particular city. In that case, the water right could be used only for municipal water supply for that particular municipality.

One reason for limiting a city's water use to the city itself is to allow the State Engineer to exercise his authority to grant water rights to other cities rather than allowing a city to become a water broker. N.D.C.C. § 61-04-06.2. In those cases where the city has not been limited in its point of application, however, it would be conceivable the city could sell water for municipal uses as authorized by statute.

The question becomes one of philosophy. Should a state-owned resource be controlled and allocated by a state agency, or should various local entities exercise control and make allocations? As discussed previously, the Legislature has determined that the State Engineer holds primary authority to control and allocate the state's water resources.

I apologize for the delay in responding to your request and for the inability to give a definitive answer to your factual question. I hope the discussion set forth above allows you to apply the law to the facts in a manner which allows you to reach your own conclusion with regard to this matter

Sincerely,

Nicholas J. Spaeth

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